Document:-
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**Summary record of the 1447th meeting**

Topic:
**Succession of States in respect of matters other than treaties**

Extract from the Yearbook of the International Law Commission:-
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article 2 (*d*),[5] should alleviate the concern expressed by Mr. Ushakov in that regard.

29. From the technical point of view, he was not sure whether it was possible to establish two separate régimes applicable to reservations for the two subcategories of treaties between which Mr. Ushakov had made a distinction—treaties concluded between States with the participation of one or more international organizations and treaties concluded between international organizations with the participation of one or more States—since that distinction was based on purely quantitative data.

30. A problem clearly arose when the number of States and organizations parties to the treaty was the same, since the treaty then fell into both categories. However, even where the number of States and the number of organizations parties to the treaty were different, it might be questioned whether the treaty should be regarded as belonging to one category rather than to the other. For instance, should a public health agreement concluded between five States and four international organizations be regarded as an agreement between States rather than as an agreement between international organizations? Admittedly, it could be said that some treaties were more in the nature of treaties between States, while others were more in the nature of treaties between international organizations. The Drafting Committee had taken account of that distinction in its draft of article 19*bis*, by providing for the case in which the participation of an international organization was not essential to the object and purpose of the treaty. However, that distinction should not be based on a purely arithmetical criterion. In the sphere of technical assistance, for instance, there were treaties between six or seven international organizations and a single State and treaties between six or seven States and a single international organization, for which there was no fundamental reason to establish different régimes.

31. In that connexion, he stressed that the Drafting Committee's text gave great weight to the object and purpose of the treaty. That criterion, which had been adopted in the Vienna Convention, seemed to be the only reasonable one since the Commission could not possibly make a detailed analysis of the structure of treaties, which would involve it in complicated and arbitrary classifications.

32. Mr. FRANCIS said that, in his view, the use of the word "several" in the title and text of article 19 adopted by the Drafting Committee was misleading and perhaps even dangerous. Treaties concluded between international organizations were a very new phenomenon and could not be treated in every respect like treaties between States. An international organization had no basic interest of its own in the sense that, fundamentally, it represented the interests of the States composing it. It was necessary to bear in mind that an international organization did not negotiate as an abstract institution but through accredited representatives, whose powers were limited. When a treaty was negotiated between two international organizations, unless those representatives were able to formulate reservations at the time when the treaty was signed, the negotiations would have to be adjourned to enable the representatives to obtain instructions and authorization from their organizations. He feared that the use of the word "several" would prevent a negotiating agent from formulating a reservation to a treaty being negotiated between two international organizations.

33. Mr. REUTER (Special Rapporteur) said that the question was whether the Commission really wished to exclude reservations to bilateral treaties. That had certainly not been the wish of the United Nations Conference on the Law of Treaties, and the Drafting Committee had followed a course which seemed to preclude such a possibility. If the Commission wished to establish a parallel between the draft articles and the Vienna Convention and not exclude the possibility of making reservations to bilateral treaties, it should revert to the formula "treaties concluded between States and international organizations" and abandon the distinction made, for drafting purposes, between treaties between States and one or more international organizations and treaties between international organizations and one or more States.

34. The CHAIRMAN said that, owing to a meeting of the Planning Group, the Commission would have to break off its discussion of article 19, but members might give some thought to the possibility of simply deleting the word "several" from the title and text of that article. It seemed to him that such a solution would be consistent with article 19 and article 2, paragraph 1 (*a*), of the Vienna Convention.

*The meeting rose at 11.30 a.m.*

## 1447th MEETING

*Monday, 27 June 1977, at 3.30 p.m.*

*Chairman:* Sir Francis VALLAT

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

### Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/301 and Add.1, A/CN.4/L.256)

[Item 3 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to examine the text of articles 17 to 21 as well as the titles of part II of the draft articles and of sections 1 and 2 of part II,

[5] *Ibid.*, foot-note 3.

* Resumed from the 1445th meeting.

as proposed by the Drafting Committee in document A/CN.4/L.256.

2. Mr. TSURUOKA (Chairman of the Drafting Committee) said that articles 17 to 20 were contained in section 1 ("General provisions") of part II of the draft (Succession to State debts). Article 21 was the first of the articles in section 2 ("Provisions relating to each type of succession of States"). Article 17 was a new article. Article 18 corresponded to draft article 0, article 19 to draft article R and article 20 to draft articles S, T and U, proposed by the Special Rapporteur in his ninth report,[1] while article 21 corresponded to draft article Z/B, proposed by the Special Rapporteur at the 1427th meeting.[2]

3. The articles proposed by the Drafting Committee read:

*Article 17. Scope of the articles in the present Part*

**The articles in the present Part apply to the effects of succession of States in respect of State debts.**

*Article 18. State debt*

**For the purposes of the articles in the present Part, "State debt" means any [international] financial obligation which, at the date of the succession of States, is chargeable to the State.**

*Article 19. Obligations of the successor State in respect of State debts passing to it*

**A succession of States entails the extinction of the obligations of the predecessor State and the arising of the obligations of the successor State in respect of such State debts as pass to the successor State in accordance with the provisions of the articles in the present Part.**

*Article 20. Effects of the passing of State debts with regard to creditors*

**1. The succession of States does not as such affect the rights of third-party creditors.**

**2. Where there is a purported passing of State debts made pursuant to an agreement or other arrangement between predecessor and successor States or, as the case may be, between successor States, it shall not be effective unless:**

**(*a*) that agreement or arrangement has been accepted by the creditor third State or international organization [or by the creditor whom a third State represents]; or**

**(*b*) the consequences of that agreement or arrangement are in accordance with the other applicable rules contained in Section 2 of Part II of these articles.**

*Article 21. Transfer of part of the territory of a State*

**1. When a part of the territory of a State is transferred by that State to another State, the passing of the State debt of the predecessor State to the successor State is to be settled by agreement between the predecessor and successor States.**

**2. In the absence of an agreement, an equitable proportion of the State debt of the predecessor State shall pass to the successor State, taking into account, *inter alia*, the property, rights and interests which pass to the successor State in relation to that State debt.**

4. He reminded the Commission that, in his ninth report, the Special Rapporteur had also proposed two articles for inclusion in section 1, relating to the question of "odious debts", namely, articles C and D,[3] which, after a full discussion in the Commission,[4] had likewise been referred to the Drafting Committee for consideration in the light of that discussion.

5. The Drafting Committee had studied the matter and, while recognizing the importance of the issues raised in connexion with the question of "odious debts", had been of the opinion that it would be best first to examine each particular type of succession, because the rules to be formulated for each type might well cover the issues connected with that question and might obviate the need to draft general provisions on it. It had therefore been generally agreed that it would be neither useful nor timely at that stage to draft articles on "odious debts" for inclusion in the section containing general provisions. It had, of course, been understood that the Commission and the Drafting Committee might wish to revert to the question later, when the draft articles on each type of succession had been formulated.

6. Reviewing the articles adopted by the Drafting Committee, he explained that the Committee had deemed it appropriate to include in part II an article 17 entitled "Scope of the articles in the present Part" in order to maintain the parallelism between the provisions concerning succession to State debts and those relating to succession to State property in part I. Article 17 corresponded to article 4[5] and reproduced its wording, with the necessary drafting changes to make it refer to State debts. The article made clear that part II of the draft dealt with only one category of public debts, namely, State debts, as defined in the subsequent article.

7. Article 18, which corresponded to Article 0 proposed by the Special Rapporteur, defined "State debt" for the purposes of the articles in part II of the draft. The use of the expression "articles in the present Part" in the text of article 18, instead of "the present articles" as in the Special Rapporteur's original proposal, conformed to usage throughout the draft and, in particular, to the language of the corresponding provision in part I, namely, article 5. Taking account of the predominant trend which had emerged from the rich debate in the Commission on the question of the definition of a State debt, the Drafting Committee had not retained in its proposed text the expressions "contracted by the central Government of a State" and "chargeable to the treasury of that State", which had qualified the words "financial obligation" in the original text. The text simply referred to any financial obligation chargeable to the State. As in article 5, specific mention was made of the "date of the succession of States", a term defined in article 3, which constituted the necessary point of reference for determining the time factor involved. Finally, the Committee had decided to place the word "international" in square brackets because of the difference of opinion among its members regarding the scope to be given to the provision. Members had agreed that the definition covered financial obligations chargeable to the State vis-à-vis another subject of international law, whether a State or an international organization, but did not extend to such obligations when the third-party creditor was an individual who was a national

[1] A/CN.4/301 and Add.1, paras. 63, 102, 108, 112 and 114, respectively.

[2] 1427th meeting, para. 16.

[3] A/CN.4/301 and Add.1, paras. 140 and 173, respectively.

[4] 1425th to 1427th meetings.

[5] See 1416th meeting, foot-note 2.

of the debtor State, whether a legal or a natural person. With regard to foreign individual creditors, some members of the Committee considered that their position was adequately safeguarded by the provisions of article 20, paragraph 1. In addition, the word "international" (in square brackets) was intended to convey the idea that the financial obligation must arise at the international level.

8. Article 19 corresponded to article R, proposed by the Special Rapporteur. Apart from using the term "the provisions of the articles in the present Part", as in article 18, the only change made by the Drafting Committee to the article had been the deletion of the opening phrase, namely, "In the relations between the predecessor State and the successor State", in order to make the text of article 19 correspond more exactly to that of article 6 (part I of the draft). The purported effect of that phrase was now safeguarded by the provisions of the redrafted article 20.

9. The new text of article 20 corresponded to draft articles S, T and U, originally proposed by the Special Rapporteur, and formed a complement to article 19. Paragraph 1 of the article laid down the basic principle that a succession of States did not, as such, affect the rights of third-party creditors. The term "creditors" included all kinds of creditors, whether States or international organizations. If the Commission decided that the draft articles should cover private individuals, they would be included under the term "creditors" as well. Paragraph 2 covered the situation in which the predecessor and successor States, or two or more successor States, formally agreed on a passing of State debts. The word "purported", however, indicated that such passing did not occur as a result of that agreement or other arrangement alone. In subparagraph (*a*), the words "or by the creditor whom a third State represents" had been placed in square brackets because of the different positions taken by the members of the Drafting Committee in regard to the scope of the draft. The Drafting Committee did not wish the inclusion of those words to be understood as referring to the consent of a foreign private creditor given independently of his representation by a third State. The meaning of those words was that, if the private creditor had given his agreement, the third State could not act on behalf of the creditor outside the agreement. In subparagraph (*b*), the word "consequences" had been used to make it clear that, in that case, the Commission was not dealing with the effect of an inter-State agreement itself, which would be governed by the Vienna Convention.[6]

10. Article 21 corresponded to article Z/B proposed by the Special Rapporteur at the 1427th meeting of the Commission. In the light of the debate in the Commission, the Drafting Committee had opted, with regard to paragraph 2, for the alternative proposed by the Special Rapporteur. Some changes had also been made to that text. First, in both paragraphs, the word "State" had been added before "debt" for the sake of precision. Second, in paragraph 2, the words "*inter alia*" had been added because it might be necessary to take account of factors other than those enumerated in the article in order to arrive at a determination of what constituted "an equitable proportion" of the State debts concerned. Third, the Committee had slightly revised the last part of paragraph 2 to improve the drafting. It should also be noted that, since a succession of States might not always involve the passing of a State debt, the wording of paragraph 1 could be somewhat ambiguous. The Drafting Committee had decided, however, to recommend to the Commission that that point be dealt with in the commentary, leaving unchanged the original expression "the passing of the State debt", which was in conformity with the corresponding article of part I, namely, article 12.

ARTICLE 17 (Scope of the articles in the present Part) [7]

11. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve the title and text of article 17 proposed by the Drafting Committee.

*It was so agreed.*

ARTICLE 18 [8] (State debt) [9]

12. Mr. USHAKOV observed that international law was concerned only with international relations; therefore, the term "State debt" should certainly be understood to mean any "international" financial obligation. The reason why the Drafting Committee had placed the word "international" in square brackets was to elicit reactions from Governments.

13. The CHAIRMAN said his understanding was that the Drafting Committee wished the word "international" to remain in the article submitted to the General Assembly, but in square brackets, because it believed that the question whether that word should appear or not required further study. Naturally, the reasons for that situation, including the comments made at the present meeting by the Chairman of the Drafting Committee, would have to be fully reflected in the Commission's report, in accordance with its usual practice in such matters.

14. Mr. USHAKOV said he would like it made clear in the commentary that, in the opinion of one member of the Commission, if the financial obligation chargeable to the State was not qualified as an "international" obligation, it might be an obligation contracted towards any natural or legal person; in particular, it might be a financial obligation contracted by a State towards its own nationals. If the draft articles were to cover the latter category of financial obligations, that would constitute a flagrant interference in the internal affairs of States. He therefore wished his interpretation of the term "any financial obligation", unqualified by the word "international", to be included in the commentary to the article under consideration.

15. Mr. SCHWEBEL said his impression was that the Drafting Committee was not making a recommendation to, but seeking the opinion of, the Commission on the

[6] See 1417th meeting, foot-note 4.

[7] For text, see para. 3 above.

[8] For the consideration of the text originally submitted by the Special Rapporteur, see 1416th to 1418th and 1420th and 1421st meetings.

[9] For text, see para. 3 above.

use of the word "international". It seemed to him that, since only one member of the Drafting Committee had expressed support for the use of that word, the most appropriate course would be for the Commission to submit to the General Assembly a text in which the word did not appear, and to explain the views of the member concerned in the commentary.

16. Article 0, as proposed by the Special Rapporteur, spoke simply of a "financial obligation", not of an "international financial obligation". The use of the latter phrase in an article would be absolutely contrary to State practice, in which there were thousands of examples of State succession to State debts which had not been debts on an international plane. So far as he was aware, no arguments had been adduced in either the Commission or the Drafting Committee for overturning that vast body of practice. Retention of the phrase would also have the effect of limiting sources of credit to States and international organizations, a restriction which would be contrary to the interests of the international community, and particularly those of the developing countries, which needed to borrow from other institutions. It would suggest to banks and similar bodies that they should not lend to any State likely to be involved in an occurrence of succession, and would therefore be contrary to the aims of the North-South dialogue, which included the widening of access to private capital markets.

17. Mr. SETTE CÂMARA said that, if it was true, as Mr. Schwebel had suggested, that the Drafting Committee was seeking a decision from the Commission on the use of the word "international", that decision would be facilitated if, in accordance with its previous practice, the Commission forwarded the text proposed by the Drafting Committee to Governments so as to obtain their views in time for its second reading of the draft articles. Not being a member of the Drafting Committee, he would be very reluctant to delete the word "international" at the present stage, without having heard the discussion in the Committee.

18. Mr. ŠAHOVIĆ said that the Drafting Committee had placed the word "international" in square brackets to show that there had been different opinions on it in the Commission and in the Drafting Committee. As Mr. Sette Câmara had said, the wording should be retained as it stood so that members of the Sixth Committee of the General Assembly would have an opportunity of stating their views.

19. Mr. QUENTIN-BAXTER observed that the function of article 18 was to provide a definition, and the Commission commonly had problems in deciding whether it should settle definitions before dealing with substance or vice versa. In his view, the article would serve well enough, without the word "international", for dealing with the various types of succession. It was his belief and hope that the definition of a State debt ultimately adopted by the Commission would follow more closely that of State property contained in article 5, for there were very strong technical and commonsense reasons for keeping those definitions in alignment.

20. There was clearly a fundamental difference of opinion among members of the Commission concerning the use of the word "international" in article 18, and it was a difference which must be resolved if the draft articles as a whole were to be successful. Even disregarding his personal preference, which was that the word should not be used, he would have great difficulty in knowing what legal value should be given to the phrase "international financial obligation" if it was ultimately adopted. The first possibility would be that the phrase was intended to make clear that the Commission was not suggesting in the article that States owed international obligations to their own nationals, but that was an intention which could be reflected in other ways in a manner which would be acceptable to the Commission as a whole. The second possibility would be that the phrase was intended as a reference to cases in which the creditor happened to have international personality, but that would introduce quite a bizarre element into the text, since the application of the articles in cases where a State had issued bonds, for example, would depend entirely on whether the buyer of those bonds was a State or international organization, or merely a private individual. The third and perhaps the most likely possibility would be that the phrase was intended to refer to obligations arising at the level of international law or, in other words, from dealings, such as treaties, between subjects of international law. That would make the text very restrictive indeed by limiting it to borrowing between Governments or between Governments and international organizations, and excluding entirely the equally important aspect of borrowing on free markets. That, he supposed, would make Governments very uncertain whether the scope of the articles was sufficiently broad to justify their adoption.

21. Mr. AGO said be believed that the question of State succession in respect of debts included debts that were not international. He also considered, however, that it would be advisable to leave the word "international" in square brackets, not only because that was the Commission's usual practice but also because there had been differences of opinion in the Commission. In addition, it was necessary to explain why article 20 purported to restrict the notion of a State debt to international debts. For in paragraph 2 (*a*) of that article, the Drafting Committee had placed the phrase relating to diplomatic protection in square brackets. The more usual case of a debt owed to a creditor not represented by a third State was not considered.

22. Moreover, the commentary to articles 18 and 20 should be drafted with particular care. The differences of opinion that had led the Commission to leave certain words in square brackets should be explained. If Governments did not favour a restrictive definition of a State debt, several provisions in the draft would have to be amended.

23. Mr. BEDJAOUI (Special Rapporteur) endorsed the reasons advanced by the Chairman, Mr. Sette Câmara, Mr. Šahović and Mr. Ago for leaving the word "international" in square brackets. He reminded the Commission that, when summing up the discussion on the text which had become article 18, he had pointed out that it could not conceal the disagreements that had arisen among its members. It would now be advisable to give the Commission time to reflect and to afford Govern-

ments an opportunity of expressing their views on the problem. For his part, he would make sure that the commentary duly reflected the discussions that had taken place in the Commission and in the Drafting Committee.

24. Mr. SCHWEBEL said that, since the majority of the members of the Commission seemed to be in favour of leaving the word "international" in square brackets, he would not press for its deletion. He could see virtue in the Commission's practice, provided that it was consistently and impartially applied, and he wished to endorse Mr. Ago's point that all the opinions expressed during the current debate should be clearly stated in the commentary.

25. The CHAIRMAN observed that, when any member of the Commission believed that a point should be brought to the attention of Governments, the Commission traditionally followed what it considered to be the balanced procedure of recording in its commentary the views of that member as well as the majority opinion.

26. If there was no objection, he would take it that the Commission agreed to approve the title and text of article 18 in the form proposed by the Drafting Committee, on the understanding that the commentary would refer to the present discussion and fully explain why the word "international" had been placed in square brackets.

*It was so agreed.*

ARTICLE 19 [10] (Obligations of the successor State in respect of State debts passing to it) [11]

27. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt draft article 19 as proposed by the Drafting Committee.

*It was so agreed.*

ARTICLE 20 [12] (Effects of the passing of State debts with regard to creditors) [13]

28. Mr. USHAKOV said he interpreted article 20, paragraph 2, to mean that the agreement concluded between the predecessor State and the successor State on the passing of State debts would be effective only if it was accepted by the creditor third State or the creditor international organization, or even by a third-party private creditor. According to that interpretation, which seemed to him the only one possible, an agreement concluded between two sovereign States would not be valid without the consent of a third State. He was still convinced that such a rule would be entirely contrary to State practice and contemporary international law, in particular the law of treaties as codified by the Vienna Convention. If the Commission adopted paragraph 2 of article 20, he would like his position to be recorded in the commentary to that article.

29. Mr. TABIBI said he had no objection to article 20. Nevertheless, in view of the importance of private creditors for developing countries, he thought the commentary should contain a full explanation of the meaning of the words in square brackets in paragraph 2 (*a*). Such an explanation would certainly be very helpful to Governments, for which the question of private creditors might be a source of concern.

30. Mr. BEDJAOUI (Special Rapporteur) said that Mr. Ushakov had been right in emphasizing the difficulty of the situation dealt with in article 20, paragraph 2, and in referring, in that connexion, to the law of treaties. However, that paragraph was not intended to prevent the predecessor State and the successor State from agreeing on whatever they wished in regard to the passing of a debt. It was only intended to impose certain limits on what they could decide by agreement where a third party was involved, which might be a State, an international organization or sometimes even a private creditor represented by a third State. For it should not be forgotten, when invoking the law of treaties, that, in the case of a debt contracted by the predecessor State under a bilateral agreement, there was already an international agreement, governed by the law of treaties, which bound the predecessor State to the third State. It might therefore be asked what became of that agreement—to which the Vienna Convention applied—when the predecessor State and the successor State in their turn agreed, by treaty, on the fate of the agreement concluded by the predecessor State with the third State. In that case, as in the succession of States in respect of treaties, there was a triangular relationship between the predecessor State, the successor State and the third State, which the Drafting Committee had taken into account in paragraph 2. That paragraph did not, in fact, provide that the predecessor State and the successor State could not agree on anything whatsoever in regard to the debt, but simply that what they agreed would only be effective with respect to the third State in so far as that State gave its consent.

31. In his opinion, however, the Drafting Committee had gone too far in referring to "the creditor whom a third State represents", since a private creditor should not be able to oppose the will of two sovereign States. It would be better to refer to a "third State representing a creditor".

32. Mr. CALLE Y CALLE said that article 20 combined draft articles S, T and U concerning the problem of third States and, by extension, international organizations and possibly private creditors. He thought the rule laid down in article 20, paragraph 2, was logical and necessary, but in paragraph 2 (*a*) the words in square brackets should be amended to read "or by a third State representing a private creditor", so that it would be clear that they referred to debts owed to private individuals by States and that only a third State representing a private creditor could consent or object to an agreement between the predecessor and the successor State. That wording would also make it clear that States sometimes provided a kind of "anticipated" diplomatic protection in cases where private creditors were not able to obtain payment of their debts, either by the predecessor State or by the successor State. In no circumstances, however, should a

[10] For the consideration of the text originally submitted by the Special Rapporteur, see 1421st to 1425th meetings.

[11] For text, see para. 3 above.

[12] For the consideration of the text originally submitted by the Special Rapporteur, see 1421st to 1425th meetings.

[13] For text, see para. 3 above.

private creditor be involved in acceptance of a debt agreement because in some cases he might be a national of the predecessor State and then become a national of the successor State, whereas in others he might really be a third party in the sense that he was a national neither of the predecessor State nor of the successor State.

33. Mr. QUENTIN-BAXTER said that, with regard to the use of the word "effective" in paragraph 2, he agreed with the Special Rapporteur that the text of article 20 would not interfere with the law of treaties. What article 20 stated was that a debt was a matter of concern not only to the predecessor State and to the successor State but also to third-party creditors, which must therefore have something to say about the way in which the debt was transmitted. The solution offered in article 20 was simply that, if the passing of a debt between the predecessor State and the successor State was in accordance with the residuary rules contained in the draft articles, the creditor must be content; but, if it was not, the creditor would not be bound by an agreement between the predecessor State and the successor State and would be entitled to protection of his rights and interests. Article 20 was thus an attempt to state that important triangular relationship.

34. Although he agreed with Mr. Calle y Calle's analysis of the problem posed by article 20, he thought that the words in square brackets in paragraph 2 (*a*) covered only the case in which a private creditor, acting in internal law, accepted the agreement between the predecessor and successor States. In such a case, the State of which the private creditor was a national would have nothing to say on his behalf. Where the creditor did not accept the agreement between the predecessor and successor States, it would be for the State of which he was a national to decide whether or not to take up his case. If that State subsequently accepted the agreement between the predecessor and successor States, then the creditor, as a private individual, would have nothing more to say because the draft articles operated only at the level of international personality.

35. The text of article 20 or the commentary thereto should indicate that, if a private creditor accepted the agreement between the predecessor and successor States, the State of which he was a national could do nothing more for him; for the effect of the words in square brackets was merely to limit the rights of private creditors, not to give them a status equivalent to that of the State which represented them.

36. Mr. DADZIE said that article 20 did not resolve the difficulties he had encountered when the Commission had discussed articles S, T and U since in paragraph 2 the words "shall not be effective unless" still subjected the debt agreement concluded between the predecessor and successor States to the will or consent of a third party, whether it was a State or a private individual. When a third party was involved in the passing of State debts, its interests should certainly be protected, but problems would arise if an agreement between the predecessor and successor States was subject to the consent of that third party. The Commission should therefore find a solution which would protect the interests of third parties and, at the same time, make the meaning of paragraph 2 clear; as it stood, it could be invoked by a third party to prevent a succession of States from taking place.

37. Mr. AGO said that, on first reading article 20, paragraph 2, he had had the same doubts as Mr. Ushakov about the words "shall not be effective unless". He had thought, however, that the intention might have been to make a distinction between the validity of an agreement and its effectiveness. Thus, an agreement concluded between the predecessor State and the successor State on the passing of State debts would be valid but not effective, since it would contain a suspensive condition, which was the consent of the third State.

38. However, his doubts had increased on the second reading of the paragraph, for he had then perceived that it was the Commission itself which, in the case of an agreement between the predecessor State and the successor State, added a suspensive condition to that agreement. If the predecessor State and the successor State provided that the agreement would become effective only when the creditor third State had given its consent, no problem arose and the rule stated in paragraph 2 was superfluous. If, however, the two States provided that the agreement would be effective from the time of its conclusion, was the Commission entitled to say that it would not be effective so long as the third State had not accepted it? It could give directives on the subject to the predecessor State and the successor State, advising them to take the interests of the third State into account and to include a clause to the desired effect in the agreement they concluded, but it could not restrict the freedom of two States which concluded an agreement.

39. It was to be hoped that the predecessor State and the successor State would take the interests of the creditor third State into account in the agreement they concluded; but if they did not, was not the agreement still valid for all that? And if it was valid, how could it be said that it was not effective?

40. Mr. SCHWEBEL said it was reassuring to see that so many members of the Commission supported article 20, paragraph 1. That provision was of fundamental importance because there was no reason why the rights of third-party creditors should be affected by a succession of States.

41. With regard to paragraph 2, in principle, he had no difficulty with the point made by Mr. Ago concerning the drafting of a rule of international law which would restrict the ability of two States to dispose of the property of a third State. Such a rule was a basic principle of municipal law and he did not see why the Commission could not reproduce it, in substance, in international law. He did not think, however, that paragraph 2 was intended to go so far as to invalidate an agreement between two States. The point it made was, rather, that such an agreement would not be effective against interested third parties. In order to make that point clear, it might be advisable to replace the words "it shall not be effective unless" by the words "it shall not be effective against third parties unless".

42. With regard to the words in square brackets in paragraph 2 (*a*), his strong view was that any agreement relating to a succession of States in respect of matters

other than treaties must comprehensively embrace actual debt relations, including those in which the creditor was not a State or an international organization. As Mr. Quentin-Baxter had rightly pointed out, however, that was by no means the same thing as saying that a third -party creditor other than a State or an international organization was an international person and could be regarded as an entity operating on the plane of international law. Referring to the examples which Mr. Quentin-Baxter had given of the primacy of the State over its nationals who were creditors, he urged that account should also be taken of the case in which a private creditor's Government rejected a debt settlement before the private creditor had been able to accept it. In such a case, the private creditor would not be entitled to accept the settlement even if he wished to do so.

43. The CHAIRMAN, speaking as a member of the Commission, said that, although he had no basic objection to the substance of article 20, he thought that, even with the inclusion of the words in square brackets in paragraph 2 (*a*), its meaning was not clear.

44. In referring to paragraph 1, Mr. Schwebel had stressed the importance of protecting the interests of "third-party creditors" but the fact was that those words had not been defined for the purpose of the draft articles. The commentary should explain what the words "third-party creditor" meant in the context of article 20.

45. In paragraph 2, he was not at all satisfied with the word "purported", a word which the Commission had usually tried to avoid. He noted that the words "an agreement providing" had been used in article 8 of the draft articles on succession of States in respect of treaties.[14] That formulation would be better than "purported" because the word "purport" was rather nebulous; he was not even sure that it was a proper juridical term.

46. He also had some difficulties with the words "or other arrangement" in the second line of paragraph 2. Either an agreement existed or it did not. Moreover, the words "or other arrangement" would give rise to problems in the interpretation of article 21, paragraph 2, which began with the words "In the absence of an agreement".

47. He thought that the words "predecessor and successor States" in paragraph 2 should be in the singular because, when a debt passed from one State to another, the relation in question was essentially bilateral, not multilateral. Similarly, the words "State debts" should be amended to read "any State debt" so that the objection of a particular creditor to an agreement would make the agreement ineffective only in relation to the particular debt for which he was a creditor. He therefore proposed that the introductory phrase of paragraph 2 should be amended to read:

> Where an agreement between a predecessor State and a successor State or between successor States provides for the passing of any State debt, it shall not be effective for that purpose unless:

48. He had no objection to the substance of paragraph 2 (*a*) but he thought that, unlike article 3 of the Vienna Convention, the present wording of that subparagraph would exclude such subjects of international law as the Holy See, which might be a creditor. He therefore suggested that the words "or other subject of international law" should be inserted between the words "international organization" and the words in square brackets. Although he normally found the use of square brackets very unsatisfactory, he thought that in the present case they were justified. If the last words of paragraph 2 (*a*) were retained in square brackets, their meaning should be made clearer and they should be fully explained in the Commission's commentary.

49. Speaking as Chairman, he suggested that, in view of all the comments which had been made about article 20, the Drafting Committee should take another look at that article and try to improve its wording.

50. Mr. TSURUOKA (Chairman of the Drafting Committee) said that, in the light of the discussion and subject to the agreement of the Special Rapporteur, he accepted the Chairman's suggestion that article 20 should be reconsidered by the Drafting Committee.[15]

51. Mr. BEDJAOUI (Special Rapporteur) said he thought the discussion on article 20, paragraph 2, had been based on a misunderstanding. That paragraph was certainly not intended to deny the freedom of the predecessor State and the successor State to conclude an agreement or to make their agreement void in the event of non-acceptance by a third State, but to uphold the existing agreement between the predecessor State and the third State.

*The meeting rose at 6.10 p.m.*

[14] See 1416th meeting, foot-note 1.

[15] For the consideration of the revised text proposed by the Drafting Committee, see 1450th meeting, paras. 7-47.

## 1448th MEETING

*Tuesday, 28 June 1977, at 10.05 a.m.*

*Chairman:* Sir Francis VALLAT

*Members present:* Mr. Ago, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Šahović, Mr. Schwebel, Mr. Sette Câmara, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta.

### Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/285,[1] A/CN.4/290 and Add.1,[2] A/CN.4/298, A/CN.4/L.253, A/CN.4/L.255)

[Item 4 of the agenda]

* Resumed from the 1446th meeting.

[1] *Yearbook ... 1975*, vol. II, p. 25.

[2] *Yearbook ... 1976*, vol. II (Part One), p. 137.